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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965.

No. 241

SIMEON A. BURNETTE, B. EARL DUNN, EDWIN H. RAGSDALE and L. RAY SHADWELL, JR.,
Appellants,

v.

LEVIN NOCK DAVIS, ALEXANDER M. HARMON, JR., and ROBERT C. BAYLISS, *Secretary and Members, State Board of Elections, et al.*

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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v.

LEVIN NOCK DAVIS, ALEXANDER M. HARMON, JR., and ROBERT C. BAYLISS, *Secretary and Members, State Board of Elections;*

THOMAS R. MILLER, *Clerk, Hustings Court of the City of Richmond;* WILMER L. O'FLAHERTY, SUE D. BROUN and ROBERT C. CHAPPELL, *Members, Electoral Board of the City of Richmond;*

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ALBERTIS S. HARRISON, *Governor of Virginia;* and ROBERT Y. BUTTON, *Attorney General of Virginia, Appellees.*

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the three-judge United States District Court for the Eastern District of Virginia, entered April 9, 1965, dismissing the intervening petition and complaint filed by appellants in the Civil Action therein pending under the style, *Harrison Mann, et al.,* v. *Levin Nock Davis, et al.,* to challenge the constitutionality of the Virginia Reapportionment Acts of 1964 and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court for the Eastern District of Virginia is not yet reported. Copies of the opinion and the order thereon are printed and attached hereto as Appendix A herewith.

JURISDICTION

The original action and the intervening petition and complaint of the appellants were brought under 28 U. S. C.

§ 1343 (3) to assert rights pursuant to 42 U. S. C. §§ 1983, 1988 and to obtain injunctions under 28 U. S. C. §§ 2281, 2284.

The original action was brought by the original plaintiffs to declare unconstitutional and void §§ 24-12 and 24-14, Va. Code, 1950, as amended by the General Assembly of Virginia in 1962 (Henrico Exhibits 36A and 35A, R. 638 and 630), reapportioning seats in the House of Delegates and Senate respectively and to enjoin the enforcement thereof.

The intervening petition and complaint of appellants was brought to declare unconstitutional and void §§ 24-12 and 24-14, and more particularly § 24-12, Va. Code, 1950, as amended by the 1964 Extra Session of the General Assembly of Virginia (Appendix C, Henrico Exhibit 11, R. 468), called by the Governor to reapportion the seats in the Senate and House of Delegates following the decision of this Court in *Davis* v. *Mann* (June 15, 1964), 377 U. S. 678, 12 L. ed 2d 609, 84 S. Ct. 1441, affirming the decision of the District Court, *Mann* v. *Davis* (1962), 213 F. Supp. 517, and the Order on Mandate of the District Court pursuant thereto entered September 18, 1964, which is not reported and which together with the opinion is hereto attached as Appendix B herewith.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. §§ 1253, 2101 (b).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Fortson* v. *Dorsey* (1965), 379 U.S. 433, 13 L.

ed 2d 401, 85 S. Ct. 498; *Davis* v. *Mann* (1964), 377 U. S. 678, 12 L. ed 2d 609, 84 S. Ct. 1441; *Reynolds* v. *Sims* (1964), 377 U.S. 533, 12 L. ed 2d 506, 84 S. Ct. 1362; *Lucas* v. *Colorado General Assembly* (1964), 377 U. S. 713, 12 L. ed 2d 632, 84 S. Ct. 1459.

THE QUESTIONS INVOLVED

1. Is Chap. 2, Acts of Assembly, Extra Session 1964, amending Sect. 24-12, Va. Code, 1950, a constitutionally valid reapportionment of seats in the House of Delegates of the General Assembly of Virginia when paragraph thirty-six thereof combines into one legislative district the separate and independent political subdivisions, Richmond City and Henrico County, for the purpose or with the resulting effect to dilute and minimize, if not to cancel out altogether, certain racial or political groups in either or both of such political subdivisions, contrary to the established and recognized tradition in Virginia to preserve the integrity of political subdivisions separately and independently entitled to more than one representative in the House of Delegates according to the population ratio per delegate then existing in the apportionment of seats in the General Assembly of the Commonwealth?

2. Does the apportionment and redistricting of the State of Virginia provided by Chap. 1 and 2, Acts of Assembly, Extra Session 1964, amending and re-enacting Sections 24-14 and 24-12, Va. Code, 1950, respectively, provide to the voters of the Commonwealth of Virginia and more particularly to the voters of Henrico County and Richmond

City in said Commonwealth, the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED

Sections 24-12 and 24-14, Va. Code, 1950, as amended by the 1964 Extra Session of the General Assembly of Virginia, are set out in Appendix C herewith.

STATEMENT

This Court's decision in *Davis* v. *Mann* (1964), 377 U. S. 678, 12 L. ed 2d 609, 84 S. Ct. 1441, affirmed the three-judge District Court for the Eastern District of Virginia, *Mann* v. *Davis* (1962), 213 F. Supp. 577, and declared the existing 1962 apportionment statutes of Virginia unconstitutional and invalid. The District Court thereupon entered its Order on Mandate of September 18, 1964 (Appendix B herewith), staying enforcement of its prior order of November 28, 1962, so affirmed, until December 15, 1964, in order to afford ample time for the General Assembly to be called into special session for the purpose of enacting constitutionally valid reapportionment statutes for both houses.

The special session so called met on November 30, 1964, and on December 2, 1964, approved to become effective March 13, 1965, the statute under consideration on this appeal, Chap. 2, Acts of Assembly, Extra Session 1964, amending § 24-12, Va. Code, 1950 (Appendix C herewith).

The statute so enacted combined for the first time in the history of the Commonwealth two separate and independent political subdivisions each of which was entitled to more than one representative in the House of Delegates according to the population ratio per delegate then prevailing under the latest decennial census. It consolidated into a single multi-member district Richmond City, having a 1960 population of 219,958 and 67,003 registered voters, and Henrico County, having a 1960 population of 117,339 and 34,220 registered voters (Henrico Exhibits 1, R. 375; 2, R. 380, 383; 21A, R. 511-513; 22A, R. 517). It awarded the single district eight delegates to be elected at large by the voters of both Richmond City and Henrico County.

The excuse publicly assigned for this novel departure from tradition was the pendency during the special session of an annexation proceeding brought by the City of Richmond against Henrico County in which the annexation court had by its written opinion of April 27, 1964 (Defendants' Exhibit 4, R. 668), and its interlocutory order of July 31, 1964 (Defendants' Exhibit 3, R. 663), awarded the city 17 square miles of Henrico territory containing approximately 45,000 residents. Only the financial adjustments remained for decision. That award was subsequently refused (R. 698; Crowe Dep., R. 233-234; Wheat Dep., R. 334-335).

The real reason for combining the city and county into a single House district was the grave concern of the Democratic members of the House of Delegates resident in Richmond City over the upsurge in voter registrations during 1964 (particularly in Richmond City during October, 1964), the growing Republican vote in Henrico County, that a Negro might be elected to the General Assembly from

the Richmond area in view of the increasing voting strength of Negroes in concentrated areas of the City, and race relations in general. Retention in the House of Delegates of members from the Richmond area of conservative political philosophy was the objective that the scheme to consolidate Richmond City and Henrico County into a single multi-member district was designed to accomplish. Such a purpose the evidence plainly establishes.

The Circumstances Surrounding
The Adoption of the 1964 Reapportionment Statutes

The Committee on Privileges and Elections of the House of Delegates had conferred prior to the convening of the General Assembly on November 30, 1964. Its report to the House of Delegates recommended 2 delegates for Henrico County separately and 6 delegates for Richmond City and Henrico County together (Henrico Exhibit 7, R. 441, 443). The Committee had before it the report, dated November 15, 1961, of the Commission on Redistricting appointed by the Governor in January of 1961, which recommended 3 whole delegates for Henrico County and 6 whole delegates for Richmond City (Henrico Exhibit 6, R. 415, 427). That Commission had requested the Bureau of Public Administration, University of Virginia, to analyze the problems and make recommendations. Its report to the Commission of July 17, 1961, presented Plan A which provided 3 whole delegates for Henrico and 6 whole delegates for Richmond City (Henrico Exhibit 5, R. 403, 406).

The recommendation of the House Committee on Privileges and Elections was not unanimous. One of its members who had been chairman of the Governor's Commission on

Redistricting filed a written dissent in favor of the recommendations of his Commission (Henrico Exhibit 7, R. 458). In so doing he said:

> "In the extensive deliberations of the Committee, I consistently observed and commented on the obvious efforts of a majority of the Committee to shield and protect numerous members of the House whose seats were in jeopardy."

The recommendation of the House Committee on Privileges and Elections was embodied in House Bill No. 1 and presented to the House of Delegates by its sponsors, one of whom was a Richmond City resident and member of the joint delegation representing Richmond City and in part Henrico County in the House of Delegates under the 1962 apportionment statute declared unconstitutional by this Court in *Davis* v. *Mann, supra.* House Bill No. 1 created a 36th District composed of Henrico County alone, having 2 delegates, and a 56th District composed of Richmond City and Henrico County of 6 delegates (Henrico Exhibit 8, R. 461, 462, 463).

The Governor in his address to the Extra Session of the General Assembly when it convened on November 30, 1964, said:

> "From the expressions of the Supreme Court in the opinions rendered in the various cases, we have some assurance that the integrity of our political subdivisions may be maintained. The Court apparently recognized that indiscriminate districting without any regard for political subdivisions or natural or historical boundary lines may be an open invitation to partisan

gerrymandering." (Henrico Exhibit 16, R. 485, 489, quoting from *Reynolds* v. *Sims* (1964), 377 U. S. at pp. 578-579, 12 L. ed 2d at p. 537, 84 S. Ct. at p. 1390).

The General Assembly also had before it a resolution of the Board of Supervisors of Henrico County, unanimously adopted October 28, 1964 (Henrico Exhibit 9, R. 464; Burnette Dep., R. 338) and a resolution of the Council of the City of Richmond, unanimously adopted November 30, 1964 (Henrico Exhibit 10, R. 466; Crowe Dep., R. 232), both of which strongly urged separate representation for the city and county. It was also advised that merger of Richmond City and Henrico County had been defeated by a Henrico County vote of 13,647 to 8,862 on December 12, 1961, while voters in Richmond City favored the merger by 15,050 to 6,698 (Henrico Exhibit 20, R. 507).

The House Committee on Privileges and Elections held a public hearing on House Bill No. 1 at which the Mayor of Richmond City, the Chairman of the Legislative Committee of the Richmond City Council and the Chairman of the Board of Supervisors of Henrico County each spoke for separate and independent representation in the House of Delegates and recognized necessary conflicts in the joint representation of the two independent political subdivisions (Crowe Dep., R. 232, 235; Wheat Dep., R. 331, 334; Burnette Dep., R. 339-340).

Richmond City and Henrico County were represented in the 1964 Extra Session of the General Assembly under the 1962 reapportionment statute declared unconstitutional by this Court in *Davis* v. *Mann, supra.* Under that statute Henrico County had one independent delegate and Rich-

mond City and Henrico had eight delegates jointly (Henrico Exhibit 36A, R. 638). Of those eight, five lived in the City of Richmond, two others living in the city were Republicans, and one resided in Henrico County (Pollard Dep., R. 228; Sutton Dep., R. 116; Bradshaw Dep., R. 285; Herrink Dep., R. 354-355; Andrews Dep., R. 94-97).

House Bill No. 1 was recommitted to the House Committee on Privileges and Elections on November 30, 1964 (Henrico Exhibit 12, R. 470). On December 1, 1964, the Committee reported the bill with amendments that eliminated altogether any independent delegate for Henrico and consolidated Richmond City and Henrico County into a single House district to be represented by eight delegates elected at large (Henrico Exhibit 12, R. 472). The Committee amendments were proposed by Delegate Andrews, a resident of Richmond City, after consulting the other members of the Richmond-Henrico delegation who were also residents of Richmond, but without consulting those residing in Henrico County (Andrews Dep., R. 80-82). The Committee amendments were adopted and floor amendments offered by the two delegates residing in Henrico County to restore separate representation were defeated. The bill with the Committee amendments passed by a vote of 74 to 22. The five Democratic delegates resident in Richmond City voted for the bill and the two Republican delegates from Richmond City and the two delegates resident in Henrico County voted against it (Henrico Exhibits 12, R. 474; 13, R. 478).

For a similar history of the 1962 Virginia reapportionment acts, see footnote 1 in *Davis* v. *Mann* (1964), 377 U.S. at p. 685, 12 L. ed 2d at p. 614, 84 S. Ct., at p. 1445.

All of the delegates representing Richmond City and Henrico County were keenly aware of the great upsurge in voter registration during 1964, particularly in Richmond City during October of 1964, and of the increasing Negro vote in Richmond City (Pollard Dep., R. 254; Dervishian Dep., R. 189, 201). The growing Republican vote in Henrico and Chesterfield Counties had also been noted (Pollard Dep., R. 254). Peculiar interest had been shown by the delegates in analyzing the trends indicated by the Congressional elections of 1962 and 1964 for the Third District, consisting of Richmond City and Henrico County as well as Chesterfield County and Colonial Heights.

In 1962 Dr. Louis Williams, a Republican, opposed J. Vaughan Gary, the Democratic incumbent. The Republican candidate had substantial Negro support and carried Richmond City. The Democrat Gary carried Henrico County and won by 400 votes, though losing in Chesterfield County (Sutton Dep., R. 120-121; Thornton Dep., R. 63-64; Bradshaw Dep., R. 289-290; Dervishian Dep., R. 190-192).

In 1964 the congressional candidates for the Third District were Dave E. Satterfield, Jr., Democrat, Richard Obenshain, Republican, and Edward Haddock, Independent (Democrat). The straight-line Democrats with strong Negro vote carried Richmond City for Haddock. The Republican carried Henrico and Chesterfield Counties. Satterfield was elected by less than 1,000 votes though he failed to carry any political subdivision in the Third Congressional District (Sutton Dep., R. 121-123; Thornton Dep., R. 64-66; Bradshaw Dep., R. 291-292; Dervishian Dep., R. 192-195).

The House of Delegates election of 1963 in Richmond City brought out 23,912 votes, of which 6,500 were Negro. In that election the Negro Crusade for Voters endorsed five Republican and two Democratic candidates and for the first time in this century two Republicans were elected to the House from that city. In the Richmond City Council election of June 9, 1964, the total vote was 30,931, of which 10,000 were Negroes. The Richmond City vote in the 1964 Federal elections was 64,526, of which 24,000 were Negroes (Thornton Dep., R. 62-63).

The evidence shows that 10 of the 68 precincts in the City of Richmond are predominately Negro by 80% or better; that 42 precincts are predominately white by 80% or more; and that 16 precincts are mixed in varied degree (Thornton Dep., R. 58-60).

With that background the anxiety observed by the Chairman of the Governor's Commission to protect the members whose seats were in jeopardy is understandable. That apprehension continued into the Extra Session of 1964. The reasons expressed by some of the five Democratic incumbents resident in Richmond City for insisting upon the consolidation of the two political subdivisions into one district were summarized as follows:

> "I think that the expressed opinions involved the retention in the members of the House of persons of conservative political philosophy and also concern(ed) about racial relations would be the principal reasons that have been discussed." (Sutton Dep., R. 130).

The same delegate testified further on questions by counsel for the Negro Richmond City intervenors, as follows:

"Q. Picking up right here, Mr. Sutton, getting a little more specific about the concern for race relations, was there not some discussion(s) as to whether a Negro might be elected into the General Assembly from the Richmond area?

"A. That has been discussed.

"Q. Was it not pointed out in this discussion that the combination of Richmond and Henrico would tend to prevent or lessen the chance of a Negro being elected to the General Assembly, in view of the growing vote in Richmond?

"A. That has been discussed.

"Q. And this was discussed by members of the present legislature from the Richmond area, the Democratic members?

"A. That is correct." (Sutton Dep., R. 131).

Such discussions were confirmed by other Delegates (Dervishian Dep., R. 198-200; Herrink Dep., R. 189-191). The Richmond City member of the Committee on Privileges and Elections agreed that annexation was not the only reason for the consolidation (Andrews Dep., R. 91-92). Another delegate testified that annexation was the only reason "argued before the Committee or on the floor of the House" (Pollard Dep., R. 245).

The 1960 census revealed that the population of Richmond City was about 40% non-white while that of Henrico County was only 5% non-white (Dervishian Dep., R. 200). (See also Henrico Exhibits 21A, R. 511; 21B, R. 514; 22A, R. 517; 22B, R. 518).

Annexation was not the basic motivating cause. The Richmond City member of the Committee on Privileges and Elections conceded that an allotment of two delegates to Henrico County, five delegates to Richmond City and one floater delegate for the county and city together would have solved all of the problems claimed to have been presented by the pending annexation suit (Andrews Dep., R. 105-106). Such an amendment was offered in the Senate and was defeated (Henrico Exhibit 14, R. 479, 480). This Court has recognized that such was the traditional use in Virginia of the "floterial district". *Davis* v. *Mann, supra,* footnote 2. (See also Bradshaw Dep., R. 295).

Never before, so far as is known, in the history of the Commonwealth have two separate and independent political subdivisions, each entitled separately and independently to more than one delegate in the House of Delegates according to the population ratio per delegate then existing, been combined and consolidated into a single district and awarded delegates jointly to be elected at large by the voters of both separate and independent political subdivisions. (See Henrico Exhibits 23A through 37D, R. 520-655). The chief objection voiced by one Richmond City Councilman was that "it was the only city that would not have had any individual representation, separate representation" (Wheat Dep., R. 334).

In 1902 the population of Roanoke City, 21,495, exceeded the ideal population ratio figure per delegate, 18,542, while that of Roanoke County, 15,837, did not (Henrico Exhibits 24, R. 530, 535; 38, R. 656). The Apportionment Act of 1902 (Chap. 567) awarded the combined population of Roanoke City and Roanoke County, 37,332, a total of 2 delegates (Henrico Exhibit 17, R. 491, 493). In 1906, how-

ever, apparently recognizing increases in the population of each in relation to the ideal population ratio as well as the historical divergence of interests between urban and rural communities, the General Assembly separated the city and county and awarded one delegate to each (Henrico Exhibit 18, R. 495, 497-498). That separation has continued to the present (Henrico Exhibits 26A and B, R. 548, 554; 28A and B, R. 562, 568; 30A and C, R. 582, 596; 19 and 32, R. 506, 611; 34A and C, R. 616, 628; 36A and B, R. 639, 645; 11 and 2, R. 469, 385; Appendix C). But in 1960 the population of Roanoke City had risen to 97,110 and that of Roanoke County to 61,693, a total of 158,803, missing the then ideal population ratio of 39,676 per delegate for four delegates by only 10,127. The Extra Session of 1964 did not combine Roanoke County and Roanoke City into a single district represented by four delegates at large, but took care of the excess over two for Roanoke City and one for Roanoke County by the traditional use of one floater delegate for the two to represent that excess (Henrico Exhibits 2, R. 382; 11, R. 468; 38, R. 656).

The same traditional respect for the integrity of political subdivisions has been observed with regard to other cities and counties. The population of Charlottesville, for example, has never equaled the ideal ratio per delegate (Henrico Exhibits 2, R. 381; 24, R. 531; 18, R. 499; 26B, R. 551; 28B, R. 565; 30C, R. 592; 32, R. 607; 34C, R. 624; 36B, R. 641; 38, R. 656). Nevertheless, Charlottesville City was granted independent representation in the House of Delegates in 1952 notwithstanding that its population was then 7,218 below the ideal population ratio per delegate of 33,187 then applicable (Henrico Exhibits 19, R. 505; 32, R. 607; 38, R. 656), and it continues to enjoy independent representation under Chap. 2, Acts of Assembly, Extra Session

1964 (Appendix C), notwithstanding its population is still 5,853 below the ideal population ratio of 1960 (Henrico Exhibits 2, R. 381; 38, R. 656).

The same is generally true of the City of Danville which achieved independent representation in the House of Delegates in 1932 notwithstanding its population was then 1,972 below the then ideal population ratio per delegate of 24,219 (Henrico Exhibits 28A and B, R. 561, 566; 38, R. 656). Prior to that time it had been combined with Pittsylvania County and had substantially the same deficiency in population in relation to the ideal population ratios per delegate successively applicable (Henrico Exhibits 18, R. 502; 24, R. 534; 17, R. 493; 26A and B, R. 548, 554). Though the population of Danville City did not equal and surpass the applicable population ratio per delegate until 1940 its independent representation has been enjoyed since 1932 (Henrico Exhibits 2, R. 382; 28A and B, R. 561, 566; 30A and C, R. 581, 594; 19, R. 505; 32, R. 609; 34A and C, R. 615, 626; 36A and B, R. 638, 643; 38, R. 656), and the 1964 Extra Session, still preserving the separate and independent representation of Danville City and Pittsylvania, gave them a floterial delegate jointly to take care of the excess in the population of each over the ideal population ratio per delegate under the 1960 census (Henrico Exhibits 2, R. 382; 11, R. 468; 38, R. 656; Appendix C).

THE QUESTIONS ARE SUBSTANTIAL

The primary question involved in this appeal is the *precise* question which this Court said was not so formulated as to bring it into focus for summary judgment on the record in *Fortson* v. *Dorsey* (1965), 379 U. S. 433, 13 L. ed 2d 401,

85 S.Ct. 498, and which this Court there also said was a question that there will be time enough to decide when demonstrated. We respectfully submit that this record fully demonstrates a case of unconstitutional apportionment within the following language of this Court in that opinion:

> "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

Both the purpose and the effect of the scheme to consolidate Richmond City and Henrico County into a single district for representation in the House of Delegates, a wholly novel departure from Virginia's tradition to preserve the integrity of its political subdivisions as such, specifically approved by this Court in this case, *Davis,* v. *Mann, supra,* was to minimize and dilute the effectiveness of the growing Negro vote in the City of Richmond and the increasing Republican strength in Henrico County in the hope of retaining in the House members of conservative political philosophy whose seats were in jeopardy.

While *Reynolds* v. *Sims* (1964), 377 U. S. 533, 12 L. ed 2d 506, 84 S. Ct. 1362, rejected the idea that equal protection *necessarily* requires single-member districts, it expressly reaffirmed the statement made in *Gray* v. *Sanders* (1963), 372 U. S. 368, 9 L. ed 2d 821, 83 S. Ct. 801: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."

Reynolds v. *Sims* also declared that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" and that "the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'."

This Court in *Davis* v. *Mann, supra,* remanded this case for further proceedings consistent with the views expressed in that opinion as well as in *Reynolds* v. *Sims.* Both opinions not only recognize that a state may maintain the integrity of its political subdivisions in order to insure some voice to them as such so long as the equal population principle is not diluted in any significant way, but *Reynolds* v. *Sims,* also foresaw that "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds* v. *Sims,* 377 U. S. at pp. 578-579, 12 L. ed 2d at p. 537, 84 S. Ct. at p. 1390; *Davis* v. *Mann,* 377 U.S. at pp. 686-687, 12 L. ed 2d at p. 614, 84 S. Ct. at pp. 1445-1446. In fact, the former opinion plainly states that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering" and that insuring some voice to political subdivisions as such is "a consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures." *Reynolds* v. *Sims,* 377 U. S. at pp. 580-581, 12 L. ed 2d at p. 538, 84 S. Ct. at p. 1391.

There can be little doubt on the evidence here presented that the underlying purpose of the 1964 Extra Session in creating a single House District out of Richmond City and

Henrico County was to merge the 15,641 qualified Negro voters in Richmond City on April 4, 1960 and the 956 qualified Negro voters in Henrico County on April 1, 1960, a total of 16,597 Negro voters in the two political subdivisions, with the total 84,618 qualified white voters in Richmond and Henrico rather than to have the 15,641 qualified Negro voters in Richmond in a smaller district with only 51,362 qualified white voters as in Richmond City alone (Henrico Exhibits 21A, R. 511; 22A, R. 517). The consolidation provided a percentage of 19.5% qualified Negro voters as of 1960 for the larger district whereas separate representation would result in 30.4% qualified Negro voters in Richmond City alone.

A similar analysis of the respective voter strength in 1964 fully justified the apprehensions of the delegates resident in Richmond and their consequent feeling of urgency. On January 1, 1964, the number of qualified Negro voters in Richmond City was 18,355 and the qualified white voters were 52,179, a total of 70, 534. The qualified voters in Henrico on November 16, 1964, numbered 933 Negroes (1,527 for Federal Elections) and 40,660 white (47,112 for Federal Elections), a grand total of 41,593, or 48,639 for Federal Elections (Henrico Exhibits 21B, R. 514; 22B, R. 518). The great upsurge in Negro registrations in Richmond City during 1964 has been noticed. Without benefit of those increases, the comparison of January figures in Richmond to November figures in Henrico County shows that in 1964 the consolidation created a percentage of 19.6% qualified Negro voters against a qualified Negro registration of at least 37% in Richmond alone.

The motivation is obvious. The result to Henrico citizens is equally obvious. Their ability to choose representatives of

their county interest is about 2/5ths as effective under the consolidation as compared to separate representation. That fact, however, did not impress the three-judge District Court because they were told that "a number of the 8 winning candidates, although resident in Richmond, received more votes in Henrico than did the candidates from that county." That may well prove the greater popularity of specific candidates wherever resident but it does not disprove that difficulties confront such candidates when the interests of the city and the county diverge, an established fact which the District Court noticed but disregarded (Sutton Dep., R. 123-125; Burnette Dep., R. 339-341; Beck Dep., R. 322-326).

In *Lucas* v. *Colorado General Assembly* (1964), 377 U. S. 713, 12 L. ed 2d 632, 84 S. Ct. 1459, this Court recognized as undesirable the at-large election of representatives in *either* house of a bicameral legislature from any area *so large as to embrace substantially diverse interests within it*. The opinion expressly states in footnote 21 that multi-member counties are not *per se* constitutionally defective, but the opinion likewise points out:

> "'One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and

> the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multi-member county represented the county as a whole."

The three-judge District Court brushed aside the principle underlying the decision in *Lucas* v. *Colorado General Assembly* on the ground that the "unification" in the case at bar did not involve so "populous" a territory as to require "identifiable constituencies." In *Lucas* the voters were at least citizens of the same county. Here the voters of a city and a county, separate political entities are combined without "identifiable constituencies."

It is also stated by the three-judge District Court that the principle contended for was recognized by the 1964 Extra Session in allotting Henrico County and Richmond City separate representation in the Virginia Senate. The District Court saw "no inconsistency in allocating senators on a different basis from delegates." However, in *Reynolds* v. *Sims* (1964), 377 U. S. at p. 576, 12 L. ed 2d at p. 536, 84 S. Ct. at p. 1389, this Court said on that subject: "In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature." If the principle of separate representation for Richmond City and Henrico County is admittedly valid for the election of senators it is equally valid for the election of delegates. The requirement that each citizen have an unweighted and undiluted voice in the election of his senator should apply with equal force to the election of delegates.

The pending annexation proceeding was an excuse but neither a valid nor the real reason for disregarding tradition. Not only has it been decided in Virginia that annexation does not affect the existing decennial reapportionment (*Alexandria* v. *Alexandria Co.* (1915), 117 Va. 230, 84 S.E. 630, citing with approval *Wade, et al.*, v. *City of Richmond* (1868), 18 Gratt. (59 Va.) 583), but the Attorney General of Virginia so advised Delegate Edward E. Lane, a resident of Richmond City, on February 19, 1962, that, under those decisions, "the existing representatives would continue to represent their respective localities" in the event of partial annexation of a county by a city, that such annexation "does not mean that the Senatorial or House districts are reapportioned by such extension", and that "The framers of the Constitution having provided for a reapportionment of Senatorial and House districts each decennial, I do not believe the Legislature is free to reapportion such districts during the interim between the decennial periods through the vehicle of annexation." (Defendants' Exhibit 2, R. 659, 660).

The Court is also reminded that the reapportionment made by the 1964 Extra Session of the General Assembly of Virginia pursuant to the Order On Mandate of the three-judge District Court in this case still does not meet the ideal requirement of "one man—one vote." A majority of the Virginia Senate can still be elected by 48.2 per cent of the total population (Henrico Exhibit 3A, R. 386 and a majority of the Virginia House of Delegates can still be elected by 47.7 per cent of the total population (Henrico Exhibit 3B, R. 387).

CONCLUSION

We respectfully submit that the questions here presented are substantial and important and that they should be considered and decided by this Court.

Richmond, Virginia

June 10, 1965

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil Action No. 2604

Harrison Mann, et al.

v.

Levin Nock Davis, et al.

ORDER ON PETITIONS AND COMPLAINTS OF INTERVENORS FROM HENRICO COUNTY, CITY OF RICHMOND AND SHENANDOAH COUNTY

Upon consideration of the intervening petition and complaint of Simeon A. Burnette, et al., designated as the Henrico County intervenors, the intervening petition and complaint of William S. Thornton; et al., designated as the City of Richmond intervenors, and the intervening petition and complaint of Jesse D. Funkhouser, et al., designated as the Shenandoah County intervenors, the answers thereto, the evidence adduced thereon, as well as the arguments of counsel, on brief and orally, the court for the reasons stated in its opinion this day filed, which is adopted as its findings of fact and conclusions of law, orders as follows:

1. That the petitions and complaints of the Henrico County and the City of Richmond intervenors be, and they are hereby, dismissed, the respondents thereto recovering their costs of the said intervenors;

2. That the petition and complaint of the Shenandoah County intervenors be, and they are hereby, sustained in respect to the apportionment of representation of that county in the House of Delegates;

3. That the State and local election officials who are defendants to the said intervening petition and complaint of Shenandoah County be, and each of them is hereby, enjoined and restrained from acting under and pursuant to so much of Chapter 2 of the Acts of the General Assembly of Virginia, Extra Session 1964, as declares the representation in the House of Delegates for the 50th and 59th districts; that the court now reapportions the said districts so that the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg shall be represented jointly by two delegates; that the reapportionment of the 50th and 59th districts of Virginia as aforesaid shall be effective for the elections, both primary and general, of members of the House of Delegates from the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg in the year 1965 and thereafter until the General Assembly of Virginia shall provide a Constitutionally valid apportionment of representation in the House of Delegates for Shenandoah County; and

4. That the court hereby approves the reapportionment Acts of the General Assembly of Virginia adopted at its Extra Session in December 1964, insofar as such approval may be required to remove any question or doubt of the

validity of any legislation which has been, or may be, passed by the General Assembly since the adoption of the said reapportionment Acts.

Nothing further remaining to be done in this action, it is ordered stricken from the docket, and this order is final.

ALBERT V. BRYAN
United States Circuit Judge

WALTER E. HOFFMAN
United States District Judge

OREN R. LEWIS
United States District Judge

April 9th, 1965.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil Action No. 2604

Harrison Mann, et al.

v.

Levin Nock Davis, et al.

(Argued March 10, 1965 Decided April 9, 1965)

Before BRYAN, Circuit Judge, and LEWIS and HOFFMAN, District Judges.

OPINION

ALBERT V. BRYAN, Circuit Judge:

Virginia's 1964 reapportionment of the State into districts for the election of delegates and senators in her General Assembly, following our invalidation of the 1962

redistricting,[1] is here attacked as denying Fourteenth Amendment equal protection of the laws. The assault is made in three separate intervening petitions in the original action, each dealing with a local problem, by certain citizens of Henrico County, the City of Richmond and Shenandoah County. We think only Shenandoah can prevail:

Henrico County

The grievance asserted by these intervenors is that Henrico County and Richmond were placed in a single district, No. 36, for representation in the House of Delegates, rather than each made an independent district. Combined, these two political subdivisions were given 8 delegates, but Henrico pleads for 3 delegates of its own, leaving the remaining 5 to Richmond. The injury from the consolidation, according to the county, is that as Richmond has a voting power greater than Henrico, the city will be able to elect all 8 delegates and Henrico will have no representation by its own citizens.

This result, says Henrico, is due to a general disregard by the General Assembly of the guide lines and ground rules thus far enunciated for legislative apportionment by the Supreme Court. E.g. Baker v. Carr, 369 U.S. 186 (1962);

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[1]. Mann v. Davis, 213 F.Supp. 577 (1962), affirmed sub. nom. Davis v. Mann, 377 U.S. 678 (1964). By order entered September 18, 1964 this court restored its injunction which had been suspended during the appeal. Thereupon the Legislature adopted a new apportionment in December 1964. The statute relating to the State Senate appears as Chapter 1, and the enactment relating to the House of Delegates as Chapter 2, of the Acts of Assembly, Extra Session 1964.

Gray v. Sanders, 372 U.S. 368 (1963); Westberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964); Fortson v. Dorsey, 379 U.S. 433 (1965). Our examination of the record discloses no such trespasses or fouls. To demonstrate the correctness of this conclusion, we review the 1964 reapportionment (the Act), touching particularly upon the features on which Henrico found its accusations.

Ideal representation in the House of Delegates, when Virginia's total population according to the 1960 census is distributed among its 100 delegates, is 39,669 persons for each member. Richmond had a population of 219,958, Henrico 117,339. Applying these figures, it appears that Henrico would be entitled to 2 delegates and wanting but 3,668 residents for a third. Richmond alone could justify 5 delegates, with 21,613 towards a sixth. To have awarded only 5 delegates to Richmond would have meant that each of its delegates represented 43,911, or 4,242 persons in excess of the norm. With Henrico not quite earning 3 delegates, but Richmond due more than 5, the solution of the Virginia Assembly was to give the two areas 8 delegates jointly. There would then be 42,164 persons per delegate, a representation fairly nearing the par of 39,669.

A multi-member district, though linking more than one political subdivision, is not Constitutionally impermissible.

Fortson v. Dorsey, supra, 379 U.S. 433 (1965). A multi-county or a county-city district is also legal. Id. But the possibility that a delegate or delegates may be chosen from one part of a district—whether a multi-county or a county-city district—rather than from another exposes no defect in the allotment. Id. In passing, it is at least noteworthy that Henrico made no objection in 1962 when the reapportionment act gave Henrico 1 delegate and then assigned 8 delegates jointly to Richmond and Henrico. While this distribution was in effect in 1963, we are told that a number of the 8 winning candidates, although resident in Richmond, received more votes in Henrico than did the candidates from that county. This would seem to refute somewhat Henrico's insistence that its citizens prefer to have their delegates come from Henrico.

The multi-member policy here does not have the "undesirable features" mooted in Lucas v. Colorado General Assembly, supra, 377 U.S. 713, 731 with footnote 21 (1964). The unification does not constitute so spacious or "populous" a territory as to demand the establishment of "identifiable constituencies". Indeed, Henrico now pledges its willingness to have 3 delegates elected at large from among its whole population of 117,339 and without a smaller constituency than its entire area.

The effect of the Act has not been to obliterate the traditional integrity in Virginia of city and county lines. The custom was sanctioned in Davis v. Mann, supra, 377 U.S. 678, 686 (1964). The individuality of Henrico and Richmond is observed by the design of a separate senatorial district for each. We see no inconsistency in allocating senators on a different basis from delegates. Such a variation has been authoritatively approved, when, as presently,

it may tend to "balance off minor inequities". Reynolds v. Sims, supra, 377 U.S. 533, 577, 579 (1964).

Physical factors could reliably have directed the judgment of the General Assembly in determining upon the union of Richmond and Henrico. They form a compact and contiguous territory. If they may not agree politically, concededly their interests are interknit and common in many aspects. The county is the residence of hundreds of business, professional and otherwise occupied persons plying their callings in the city. In fact, while the two are distinct governmental units, the courthouse of the county is situate well within the city's corporate limits. At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the Constitutional standard of weight and fineness, "one person, one vote".

City of Richmond

Certain Richmond Negro residents question the fusion of the city and Henrico County for the election of delegates on the ground that it deprives Negro citizens of a chance to elect one of their race to the General Assembly. They point out that the population of Richmond consists of 92,331 non-white and 127,627 white persons; that in Henrico the non-white residents number 6,070, the white 111,269; and that the potential vote of Negroes in Richmond is, by the coadunation, reduced from 42% (the percentage of non-white in Richmond) to 29% (the percentage of non-whites in the aggregate population of the city and Henrico).

Further, they suggest that the Negro communities in Richmond are so located that any division of the city into

5 fairly equal segments, each embracing a sufficient number of inhabitants for a delegate, would create 1 or more districts in which Negroes would be the majority. Additionally, they say that if the city were divided into 2 substantially equal districts with the allotment of 1 of Richmond's 2 senators to each district, the colored population in at least 1 might elect a senator.

Consequently, these intervenors suggest that Richmond be assigned 5 delegates apart from Henrico, and that the 5 be distributed, 1 to a district, among 5 substantially equal districts. Likewise, they ask that the city be fairly split into 2 senatorial districts. These contentions are underbraced by advertence to the Virginia constitutional injunction that legislators be elected by the voters of the several senatorial and house districts, and that apportionment of the "State" into such districts be made every ten years. §§ 41, 42 and 43. From this they conclude that these clauses command legislative allocation, both within and without city and county marches, by population and not according to existing governmental units. Omission of such delineations inside the city and State-wide, the intervenors aver, violates the Fourteenth and Fifteenth Amendments, as a deprivation of equal protection of the election laws and abridgement of the right to vote. We disagree.

To begin with, we reaffirm our earlier declaration of the validity of conjoining Richmond and Henrico. Moreover, as we have also shown, adherence to municipal boundaries in establishing legislative districts has been declared to be altogether free of legal infirmity. Furthermore, the racial exclusion decried in Gomillion v. Lightfoot, 364 U.S. 399 (1960) and universally forbidden is not evident. Neither

Richmond, nor any other city or county in Virginia has in her history ever been sub-districted. Even councilmen for the local government of Richmond are elected at large, and this without question by either race.

The concept of "one person, one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.

As Justice Douglas, though in dissent but obviously undeniably, tartly put it in Wright v. Rockefeller, 376 U.S. 52, 62, 66 (1964):

> "The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."

Page 66:

> ". . . The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines. . . ."

Previously Justice Douglas had said for the Court in Gray v. Sanders, supra, 372 U.S. 368, 380 (1963):

> ". . . The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, . . . and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State."

Shenandoah County

Certain citizens of Shenandoah County protest they have been deprived of Constitutional rights by the 1964 assignment of delegates in the 50th and 59th districts. The former, which has been assigned 1 delegate, comprises Page, Rockingham, Shenandoah Counties and the City of Harrisonburg. The 59th district encompasses only Rockingham County and Harrisonburg but it is also given 1 delegate. Harrisonburg is geographically within Rockingham County. Over-representation of Shenandoah County under the 1962 reapportionment was noted in Davis v. Mann, supra, 377 U.S. 678, 688; it had "one seat in the Virginia House" although its population was 21,825 as compared to the "ideal ratio of one delegate for each 39,669 persons".

In 1964 Shenandoah's 21,825 people were leagued with Rockingham's 39,559, Page County's 15,572, and Harrisonburg's 12,842, increased to 13,804 by an annexation in 1962.* Obviously this readjustment erects a district of

* These figures are taken from the face of the complaint of the Shenandoah Intervenors. The U.S. Bureau of Census' U.S. Census of Population: 1960 General Population Characteristics, Virginia. Final Report PC(1)-48B, reveals Rockingham's population as 40,485 and Harrisonburg's as 11,916 rather than 12,842 prior to annexation.

90,760, far above criterion of 39,669. Rockingham and Harrisonburg are saved from injustice by their additional delegate, but Shenandoah with Page suffers from a clear under-representation.

Invidious discrimination has thus been visited upon Shenandoah. With primary elections for the General Assembly scheduled for July of this year, and candidates' filing times therefor expiring in April, correction of this injury to Shenandoah County cannot await the convening of the General Assembly in 1966. Consequently, we are required to act to prevent the watering down of the Shenandoah votes. Until the General Assembly can rectify the inequity, we must set aside the 1964 apportionment of the 50th and 59th districts. In lieu of the present provision for them, the court will order that the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg be assigned 2 delegates to represent all four of these political subdivisions jointly. This adjustment will effectuate a representation of 45,380 persons per delegate. While this is above the proper ratio, we do not deem it an unfair approach in the circumstances.

Recapitulation

The record does not authorize attribution to the General Assembly of caprice or an unacceptable motive in the Henrico and Richmond reapportionment. To the contrary, a firm foundation may be seen for it. For Shenandoah County, however, the imbalance in representation is obvious and fatal.

An order will be entered dismissing the intervening complaints of Henrico and Richmond, but sustaining the claim of the Shenandoah intervenors, with the relief we have prescribed. The order will also express our approval of the Act insofar as such approval is required to remove any question or doubt of the validity of any legislation which has been, or may be, passed by the General Assembly since the adoption of the Act, our order of September 18, 1964 having required the General Assembly acting thereafter to make a Constitutionally valid reapportionment of the State before undertaking any other legislation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil Action No. 2604

HARRISON MANN, et al.,

v.

LEVIN NOCK DAVIS, et al.,

ORDER ON MANDATE

This action came on to be heard upon the mandate of the Supreme Court of the United States affirming the judgment order of this Court entered November 28, 1962, upon the motions of the plaintiffs and intervening plaintiffs for an order on said mandate and the argument of counsel; upon a consideration of all of which it is

DECLARED, ADJUDGED AND ORDERED:

1. That the Governor of Virginia and the Attorney General be dismissed as parties defendant to this action;

2. That the motion of the defendants to dismiss the complaint and intervening petition be denied;

3. That the acts of the General Assembly of Virginia, approved April 7, 1962, appearing as Chapter 635, page 1266, and Chapter 638, page 1269 of the 1962 Acts of the Assembly of Virginia, deny the plaintiffs and plaintiff-interveners and those persons similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, and that the said acts for that reason are void and of no effect;

4. That the order entered by this court on November 28, 1962 be in all respects reaffirmed but the enforcement of said order be further stayed until December 15, 1964 insofar as necessary to afford ample time for the General Assembly of Virginia to be called and convened in special session, if the Governor or the requisite number of members of the General Assembly are so advised, for the purpose of enacting constitutionally valid reapportionment statutes for both houses of the General Assembly, and enact statutes to effectuate said reapportionment by providing for the election of members of both houses of the General Assembly from the districts of the State as reapportioned;

5. That, for the reasons set forth in the opinion filed this day, the terms of the present members of the House of Delegates shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms for which they were elected in November, 1963 or in any special election thereafter, that is on the day before the second Wednesday of January, 1966;

6. That, for the reasons set forth in said opinion, the terms of the present members of the Senate, who were elected in November 1963 or in any special election thereafter, shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms of the members of the House of Delegates elected in November, 1963 or thereafter as aforesaid, that is the day before the second Wednesday in January, 1966;

7. That the motion of the plaintiffs and plaintiff-interveners that the present General Assembly be enjoined at this time from enacting any legislation other than the said reapportionment statutes be denied; but by way of a declaratory judgment the court now states that after the enactment of a constitutionally valid reapportionment statute the present General Assembly may until the 2nd Wednesday in January 1966 consider and pass such legislation as it deems necessary or proper in the public interest, unless before that date through special elections a General Assembly is chosen in conformity with the new reapportionment statute.

8. That the motion of the defendants for a continuance is also denied, in view of the stay herein granted of the effectiveness of the order issued by this Court on November 28, 1962;

9. That the plaintiffs and plaintiff-interveners recover of the defendants their statutory costs, assessed or assessable in the Supreme Court and in this court, and that the motion of the plaintiff-interveners for an allowance of counsel fees as a part of said costs is denied; and

10. That if the steps stated in paragraph 4 hereof for reapportionment be not taken before December 15, 1964, or if taken they do not meet the requirements of a constitutionally valid reapportionment, then the plaintiffs, the plaintiff-interveners and any part *(sic)* hereafter granted leave to intervene, may apply to the court for such further orders as may be required; and jurisdiction of this action is hereby retained for entry of such other orders as may be necessary or proper.

United States Circuit Judge

United States District Judge

United States District Judge

September 18, 1964.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil Action No. 2604

HARRISON MANN et al.,

v.

LEVIN NOCK DAVIS et al.,

(Argued September 10, 1964 Decided 1965)

Before BRYAN, Circuit Judge, and HOFFMAN and LEWIS, District Judges.

OPINION UPON ORDER ON MANDATE

ALBERT V. BRYAN, Circuit Judge:

A foremost concern in framing the order on the mandate of the Supreme Court affirming our original decree is the question of the maximum period in which the present, 1963, General Assembly elected under the condemned statute may still function and with what powers. In our opinion it must expire as to both houses not later than the 2nd Wednesday in January 1966.

We think the 1963 Assembly necessarily is empowered to enact the requisite reapportionment laws. There is no other body to do so, and unless its jurisdiction is recognized for this purpose the State would be helpless to accomplish the reapportionment. The Supreme Court has tacitly approved this accordance of provisional vitality to the existing legislature. Maryland Committee v. Tawes, 377 U. S. 656, 675 (1964); Reynolds v. Sims, 377 U. S. 533, 585 (1964) adopting the view expressed by Justice Douglas concurring in Baker v. Carr, 369 U. S. 186, 250 footnote 5.

We think, also, that after the 1963 Assembly has enacted a constitutionally valid reapportionment statute—but not before then —and during the interval between its adoption and the commencement of the terms of the Senators and Delegates chosen in the 1965 elections, *vide post,* the Assembly should not be restrained from considering and passing such legislation as it considers necessary or proper in the public interest. If the present legislature could not act in this interim, a potentially dangerous interregnum could result, for there would be no legislature available in an emergency. Moreover, if this authority were not conceded, special elections for the creation of a new General Assembly would have to be called immediately after the passage of the reapportionment statute. This would mean an election of Delegates to serve for a matter of months, when a primary election of Delegates is probable in July and a regular general election is set for November, 1965. That would be an undue burden upon the State elective processes. In these exigencies general principles of equity, as noted by the Supreme Court in the decisions just cited, sustain an order permitting such a temporary continuance of the powers of the current legislature.

In the effort to minimize disruption of the State's elective processes as far as possible, but still consistently with our first order, it is well to recall those processes and consider their application here. When our finding of invalidity in the legislative apportionment was made in November 1962, both houses of the General Assembly were to stand for election the following year, 1963. During the temporary stay of enforcement of this finding, the 1963 election proceeded upon the unconstitutional apportionment. Delegates were then chosen for 2-year terms expiring on the 2nd Wednesday in January 1966, and the Senators were selected for 4 years each, that is until the 2nd Wednesday in January 1968.

Orderly procedure would, therefore, suggest that the 1963 House of Delegates should continue in being until the expiration of their terms in January 1966. Cf. Reynolds v. Sims, supra 377 U. S. 533, 585 (June 15, 1964). In the November 1965 general election a House of Delegates will, under the Virginia law, be elected to assume their duties on the 2nd Wednesday in January 1966. Of course, the 1965 House would be serving under the new apportionment.

As noted, however, the 1963 Senate would not normally leave office until January 1968. Elected on a void pattern of representation, there is no warrantable foundation for its accreditation beyond January 1966. Further, if it should be allowed to survive until 1968, the General Assembly—from January 1966 to January 1968—would be composed of a House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (in-

validated) plan. This too, would be constitutionally unjustifiable. Together the two houses in a bicameral system form a unitary and entire Legislature. For equality of popular representation they are mutually complementary, and constitutional validity is not fulfilled if one house is deliberately permitted to lag behind the other in seeking fairness of representation. Cf. Maryland Committee v. Tawes, supra, 377 U. S. 656, 673.

Incidentally, practical difficulties might develop if the life of the 1963 Senate lasted until 1968. In the event of vacancies in the Senate, as an illustration, they could not be filled because no elections may be conducted under the nullified apportionment statutes. Reynolds v. Sims, supra, 377 U.S. 533, 585. Probably none could be held under the new act because of the subsequent rearrangement of the district. While such eventualities might occur in the House of Delegates also, the opportunity there for such contingencies is for one year only—1965.

For these reasons we hold that the terms of the 1963 elected Senators as well as Delegates must come to an end not later than January 1966. Unavoidably, this will mean a special election of Senators to serve from January 1966 to January 1968. However, to repeat, we have stated only the maximum limits of the life of the present legislature. We do not mean to say that special elections may not be called

earlier than November 1965, if the legislature desires, so that a General Assembly under the new reapportionment statute might be constituted before January 1966.

United States Circuit Judge

September 18, 1964.

We concur:

United States District Judge

United States District Judge

Henrico Plaintiff-Interveners' Exhibit No. 37D

CHAPTER 1

An Act to amend and reenact § 24-14, as amended, of the Code of Virginia, relating to State senatorial districts.

[S 1]

Approved Dec. 2, 1964

Be it enacted by the General Assembly of Virginia:

1. That §24-14, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-14. The State is hereby divided into * *thirty-three* districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, * *Mathews, Gloucester and York,* one.

Second.—Norfolk city, * *three.*

Third.—* *The cities of Chesapeake, Portsmouth and Virginia Beach, three.*

Fourth.—The counties of Halifax, Charlotte, * Prince Edward, *Lunenburg and Nottoway* and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton, and the cities of Suffolk and Franklin, one.

Sixth.—The counties of Greensville, *James City,* Prince George, Surry and Sussex, and the * *cities* of Hopewell *and Williamsburg,* one.

Seventh.—The counties of Brunswick, * *Dinwiddie* and Mecklenburg, *and the city of Petersburg,* one.

Eighth.—The counties of * *Arlington and Fairfax, and the cities of Fairfax and Falls Church,* one.

Ninth.—Arlington county, one.

* *Tenth.*—The counties of Appomattox, Buckingham. * Amherst, Nelson and * *Campbell,* one.

* *Eleventh.*—* *Bedford* County and city of Lynchburg, one.

* *Twelfth.*—The counties of Henry, Patrick and Pittsylvania, and the cities of Danville and Martinsville, two.

* *Thirteenth.*—The counties of * Carroll, Floyd, * *Franklin and Montgomery,* and the * *cities* of Galax *and Radford,* one.

* *Fourteenth.*—The counties of Washington, Lee and Scott and the city of Bristol, one.

* *Fifteenth.*—The counties of Dickenson, *Russell* and Wise and the city of Norton, one.

* *Sixteenth.*—The counties of Buchanan, * *Smyth* and Tazewell, one.

* *Seventeenth.*—The counties of Bland, Giles, Pulaski, *Craig, Grayson* and Wythe, one.

* *Eighteenth.*—The counties of Alleghany, * *Bath,* Botetourt, * and * *Roanoke,* and the cities of * Clifton Forge and Covington, one.

* *Nineteenth.*—The counties of Augusta, * *Rockbridge* and Highland, and the cities of *Buena Vista,* Staunton and Waynesboro, one.

* *Twentieth.*—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

* *Twenty-first.*—The counties of Clarke, Frederick, Shenandoah *and Loudoun* and the city of Winchester, one.

* *Twenty-second.*—The counties of Albemarle, Fluvanna, Greene, *Cumberland, Powhatan* and Madison, and the city of Charlottesville, one.

* *Twenty-third.*—The counties of Goochland, Louisa, Orange, * Spotsylvania, *Culpeper, Caroline, King George* and the city of Fredericksburg, one

* *Twenty-fourth.*—The county of Fairfax and the cities of Fairfax and Falls Church, two.

* *Twenty-fifth.*—The counties of * Prince William, * Stafford and *Fauquier,* one.

* *Twenty-sixth.*—The counties of * Hanover, King William, Essex, King and Queen, Middlesex, *Westmoreland, Northumberland, Richmond and Lancaster,* one.

* *Twenty-seventh.*—City of Newport News *, one.

* *Twenty-eighth.*—City of Hampton, one.

* *Twenty-ninth.*—The counties of Charles City, Chesterfield, * *Amelia* and New Kent and the * *city* of Colonial Heights *, one.

* *Thirtieth.*—Richmond city, two.

* *Thirty-first.*—County of Henrico, one.

* *Thirty-second.*—City of Roanoke, one.

* *Thirty-third.*—City of Alexandria, one.

Dec. 10, 1964

A TRUE COPY, TESTE:

GEORGE R. RICH

Clerk of the House of Delegates and
Keeper of the Rolls of the State

Henrico Plaintiff—Intervenors' Exhibit No. 11

CHAPTER 2

An Act to amend and reenact § 24-12, as amended, of the Code of Virginia, relating to apportionment of the members of the House of Delegates.

[H 1]

Approved December 2, 1964

Be it enacted by the General Assembly of Virginia:

1. That § 24-12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates as follows:

**First.—Chesapeake, two.*

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, *Botetourt*, Covington and Clifton Forge, one.

Seventh.—Amelia, * *Lunenburg* and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, * *four*.

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland, * *Craig*, Giles, *Pulaski and Wythe*, * *two*.

* *Thirteenth.—Danville and Pittsylvania*, one.

Fourteenth—Brunswick and * *Dinwiddie*, one.

Fifteenth.—Buchanan, one.

Sixteenth.—Russell and Dickenson, one.

* *Seventeenth.—Roanoke City and Roanoke County*, one

Eighteenth.—Campbell, one.

Nineteenth.—Caroline, King George, Essex and King and Queen, one.

**Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church*, one.

Twenty-first.—* James City, * York and Williamsburg, one.

Twenty-second.—Charlotte, *Cumberland* and Prince Edward, one.

Twenty-third.—Chesterfield and Colonial Heights, * *two.*

Twenty-fourth.—Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, * *two.*

Twenty-seventh.—Fairfax *County* and cities of Fairfax and Falls Church, * *six.*

Twenty-eighth.—Fauquier, *Warren* and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, * Louisa *and Powhatan,* one.

Thirtieth.—Franklin *County and Floyd,* one.

Thirty-first.—Gloucester, Mathews, *New Kent, Charles City* and Middlesex, one.

Thirty-second.—*Carroll,* Grayson and Galax, one.

Thirty-third.—Greensville, *Surry* and Sussex, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth.—Henrico, * *and city of Richmond, eight.*

Thirty-seventh.—Henry, Patrick and Martinsville, two

Thirty-eighth.—Isle of Wight, * *Southampton* and * *city of Franklin,* one.

Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun *and Prince William, * two.*

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth.—Nelson *, *Appomattox and Buckingham*, one.

* *Forty-ninth.*—Norfolk City, * *seven.*

* *Fiftieth.*—Page *, *Rockingham, Shenandoah and Harrisonburg*, one.

* *Fifty-first.*—Petersburg *, one.

* *Fifty-second.*—Pittsylvania, * one.

* *Fifty-third.*—Portsmouth, * *three.*

* *Fifty-fourth.*—Prince George * and Hopewell, one.

* *Fifty-fifth.*—* Virginia Beach, two.

* *Fifty-sixth.*—Roanoke County, one.

* *Fifty-seventh.*—Roanoke City, two.

* *Fifty-eighth.*—Rockbridge, Bath and Buena Vista, one.

* *Fifty-ninth.*—Rockingham and Harrisonburg, * *one.*

* *Sixtieth.*—Smyth, one.

* *Sixty-first.*—Spotsylvania, Stafford and Fredericksburg, one.

* *Sixty-second.*—Tazewell, one.

* *Sixty-third.*—Washington, Scott and Bristol, two.

And the districts hereby created are hereby numbered one (1) to * *sixty-three (63)* inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five.

2. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decisions shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such

unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

Dec. 10, 1964

A TRUE COPY, TESTE:

GEORGE R. RICH

Clerk of the House of Delegates and
Keeper of the Rolls of the State

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IN THE

Supreme Court of the United States

October Term, 1965

No. 241

SIMEON A. BURNETTE, ET AL.,
Appellants,

v.

LEVIN NOCK DAVIS, ET AL.,
Appellees.

Appeal From The United States District Court For The Eastern District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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Appeal From The United States District Court For The Eastern District of Virginia

---

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

On June 10, 1965, appellants forwarded to this Court their jurisdictional statement supplementing their appeal from a final order of the United States District Court for the Eastern District of Virginia dismissing appellants' petition and complaint in intervention in this litigation. The appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by such appeal, file this statement in opposition to appellants' jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the

question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On June 15, 1964, this Court affirmed the judgment order which the three-judge district court below had entered on November 28, 1962, declaring invalid under the Equal Protection Clause of the Fourteenth Amendment two statutes enacted by the General Assembly of Virginia decennially reapportioning the House of Delegates and Senate of Virginia as required by Section 43 of the Constitution of Virginia (1902). See, Sections 24-12 and 24-14, Code of Virginia (1950) as amended. *Mann* v. *Davis,* 213 F. Supp. 577, *aff'd. sub. nom. Davis* v. *Mann,* 377 U.S. 678.

Upon remand, the district court entered its further order of September 18, 1964, reaffirming its prior order but staying enforcement thereof until December 15, 1964, to afford the General Assembly of Virginia ample time (1) to enact constitutionally valid reapportionment statutes for both houses of the General Assembly and (2) to effectuate such statutes by providing for the election of members of both houses from the districts of the State as thus reapportioned.

On November 30, 1964, the General Assembly of Virginia convened in special session and enacted such reapportionment statutes by amending and reenacting Sections 24-12 and 24-14 of the Virginia Code. See, Chapters 1 and 2, Acts of Assembly, Extra Session, 1964. These amendments were approved by the Governor of Virginia on December 2, 1964, and became effective March 13, 1965.

On December 17, 1964, certain citizens of Henrico County and of the city of Richmond (hereafter referred to as Henrico plaintiff-interveners and Richmond plaintiff-interveners) filed their separate petitions for leave to intervene in this

litigation and to file their respective complaints in intervention attacking the validity of the amended reapportionment statutes. By orders entered December 23 and December 30, 1964, the district court permitted such intervention and scheduled the filing of pleadings, exhibits, lists of witnesses and briefs. On March 10, 1965, the cause was heard on the merits, and on April 9, 1965, the district court filed its opinion and final order dismissing the instant appellants' petition and complaint in intervention and striking the case from the docket. The opinion and order of the district court are set out in Appendix A and Appendix B, respectively, of this statement.

STATEMENT OF FACTS

Chapter 2, Acts of Assembly, Extra Session, 1964, amended and reenacted Section 24-12 of the Virginia Code and apportioned the House of Delegates of Virginia into 63 districts. Under this enactment, the county of Henrico and the city of Richmond comprise the Thirty-Sixth district, represented by 8 delegates. The district so created contains a total population of 337,297 according to the 1960 census, which population gives rise to a representative ratio of 42,162 persons for each of the district's 8 delegates. With a total State population of 3,966,949, each of the 100 delegates in the lower house of the Virginia General Assembly would presumably represent 39,669 persons.

Chapter 1, Acts of Assembly, Extra Session, 1964, amended and reenacted Section 24-14 of the Virginia Code and apportioned the Senate of Virginia into 33 districts. Under this enactment, the county of Henrico comprises the 31st senatorial district, represented by 1 Senator, and the city of Richmond comprises the 30th senatorial district, represented by 2 Senators. Henrico County has a total population

of 117,339 and the city of Richmond has a total population of 219,958, according to the 1960 census. These population figures give rise to a senatorial representative ratio of 117,339 persons for Henrico County's 1 Senator and 109,979 persons for each of the city of Richmond's 2 Senators. With the total State population of 3,966,949, each of the 40 Senators in the upper house of the General Assembly of Virginia would presumably represent 99,174 persons.

THE STATUTES INVOLVED

Under attack in these proceedings are Chapters 1 and 2, Acts of Assembly, Extra Session, 1964, which respectively divide the Senate and House of Delegates of the General Assembly of Virginia into 33 senatorial and 63 house districts. As the statutes in question are somewhat extensive, they have been set out in full in the appendix to this statement. See, Appendix C, *post*.

QUESTION PRESENTED

Do Chapters 1 and 2, Acts of Assembly, Extra Session, 1964, deny the Henrico plaintiff-interveners, and other persons similarly situated, the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

The Statutes In Question Do Not Deny The Henrico Plaintiff-Interveners The Equal Protection Of The Laws Under The Fourteenth Amendment To The Constitution Of The United States.

In considering the question sought to be presented by the instant appeal, it is important to identify at the outset the

precise nature of the complaint put forward by the appellants (Henrico plaintiff-interveners) in the court below. This is easily and conclusively established by reference to the initial paragraph of that portion of the district court's opinion which relates to the Henrico plaintiff-interveners' petition and complaint. In this connection, the district court declared (Appendix A, App. 2):

> "The grievance asserted by these intervenors is that Henrico County and Richmond were placed in a single district, No. 36, for representation in the House of Delegates, rather than each made an independent district. Combined, these two political subdivisions were given 8 delegates, *but Henrico pleads for 3 delegates of its own, leaving the remaining 5 to Richmond. The injury from the consolidation, according to the county, is that as Richmond has a voting power greater than Henrico, the city will be able to elect all 8 delegates and Henrico will have no representation by its own citizens.*" (Italics supplied.)

Proceeding to consider this contention in the factual context in which it was made, the district court noted (Appendix A, App. 2-3):

> "Ideal representation in the House of Delegates, when Virginia's total population according to the 1960 census is distributed among its 100 delegates, is 39,669 persons for each member. Richmond had a population of 219,958, Henrico 117,339. Applying these figures, it appears that Henrico would be entitled to 2 delegates and wanting but 3,668 residents for a third. *Richmond alone could justify 5 delegates, with 21,613 towards a sixth.* To have awarded only 5 delegates to Richmond would have meant that each of its delegates represented 43,911, or 4,242 persons in excess of the norm. *With Henrico not quite earning 3 delegates, but Richmond*

> *due more than 5,* the solution of the Virginia Assembly was to give the two areas 8 delegates jointly. There would then be 42,164 persons per delegate, a representation fairly nearing the par of 39,669." (Italics supplied.)

In light of the foregoing summary, it is manifest that *if the population of Henrico County alone* were to be considered, the General Assembly of Virginia would have been justified in apportioning three delegates to that county, even though the county would have been 3,668 residents short of a full ratio for the third delegate. Such an allocation, however, would have left only five delegates to be awarded to the city of Richmond, despite the fact that the population of the city was sufficient to justify not only five full delegates, but also supply more than half the ratio (21,613/39,669) for a sixth delegate. In this setting, the action of the General Assembly in combining the county and city into one district and allotting that district eight delegates jointly had the effect of (1) balancing off the deficiency in the county's population and the overage in the city's population and (2) more nearly approaching the constitutional standard of "one person, one vote" than would have been the case if Henrico County had been allotted three delegates separately and the city of Richmond five delegates separately.

Moreover, as pointed out by the court below, additional relevant considerations buttressed the General Assembly's decision to combine the county and city into one district. In this connection, the district court observed (Appendix A, App. 4):

> "Physical factors could reliably have directed the judgment of the General Assembly in determining upon the union of Richmond and Henrico. They form a compact and contiguous territory. If they may not agree

> politically, concededly their interests are interknit and common in many aspects. The county is the residence of hundreds of business, professional and otherwise occupied persons plying their callings in the city. In fact, while the two are distinct governmental units, the courthouse of the county is situate well within the city's corporate limits. At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the Constitutional standard of weight and fineness, 'one person, one vote'."

Confirming these observations of the district court were the circumstances—fully documented of record—surrounding the annexation proceedings involving the city of Richmond and Henrico County which were being prosecuted when the challenged apportionment statutes were enacted. At that time, there were pending in the Circuit Court of Henrico County annexation proceedings through which the city of Richmond sought to annex some 152 of the 232 square miles comprising Henrico County. Indirectly, these proceedings had their inception in a resolution of the Board of Supervisors of Henrico County, dated July 28, 1960, in which the governing body of the county expressed its willingness to negotiate with the city council of Richmond for the purpose of determining whether or not a mutually agreeable and satisfactory plan could be developed for the consolidation of the county of Henrico and the city of Richmond into a single city of the first class. A similar resolution was subsequently adopted by the city council of the city of Richmond on August 15, 1960.

When no plan of consolidation acceptable to the citizens of both political subdivisions was forthcoming, the city of Richmond filed its original annexation proceedings on December 27, 1961. Thereafter, on April 27 and July 31, 1964, respectively, the Circuit Court of Henrico County rendered

its opinion and entered its interlocutory order decreeing that the necessity for and expediency of annexing certain areas in Henrico County to the city of Richmond existed and allowing annexation by the city (under certain conditions) of some 17 square miles of Henrico County containing a population of some 45,000 persons. No sum representing the amount which the city would be required to compensate the county in respect of such annexation had been fixed by the annexation court when the General Assembly of Virginia convened in special session on November 30, 1964, nor had the city of Richmond indicated whether it would accept or reject the annexation terms, or appeal the decision of the Circuit Court of Henrico County to the Supreme Court of Appeals of Virginia.

Under these circumstances, the General Assembly was confronted with a wide range of conflicting possibilities which involved the capital city of the Commonwealth and depended upon the outcome of the pending annexation litigation. If the city of Richmond should reject the annexation terms, the population of Henrico County would justify allocating to it three seats in the House of Delegates. If the city of Richmond should accept the annexation terms, the population of Henrico County would be reduced by some 45,000 inhabitants and the remaining population of the county would be sufficient to justify allocating the county only two delegates. If the city of Richmond should appeal the annexation court's decision, the possible consequences would be multiple and uncertain, with final determination of these consequences possibly postponed for an indefinite number of years. Lacking clairvoyance, the General Assembly of Virginia could not possibly have known—when the challenged statutes were enacted—what the final disposition of the above-described annexation activities would

be or what the populations of the county of Henrico or the city of Richmond would be.

In this setting, the General Assembly decided to apportion Henrico County one seat in the Senate of Virginia, thus assuring the citizens of the county (or what might remain of the county after annexation) an exclusive voice in the General Assembly regardless of the ultimate outcome of the annexation litigation. With respect to representation in the more populous branch of the legislature, the General Assembly decided to combine the areas in question into a multi-member district in which principle of population-based representation would be wholly uninfluenced by the pending annexation proceedings *regardless of the timing or character of their ultimate disposition*. By combining the county and the city into one district, the General Assembly insured that the constitutional principle of population-based representation in the House of Delegates could not possibly be affected by the culmination of the annexation activities.

This desirable result was achieved by establishing a multi-member district composed of the county and the city—a method of apportionment which had already received, and has since received, the express approbation of this Court. *Reynolds* v. *Sims*, 377 U. S. 533, 577; *Fortson* v. *Dorsey*, 379 U. S. 433. As the district court stated (Appendix A, App. 3):

> "A multi-member district, though linking more than one political subdivision, is not Constitutionally impermissible. *Fortson* v. *Dorsey, supra*, 379 U.S. 433 (1965). A multi-county or a county-city district is also legal. Id. But the possibility that a delegate or delegates may be chosen from one part of a district—whether a multi-county or a county-city district—rather than from another exposes no defect in the allotment. Id. In pass-

ing, it is at least noteworthy *that Henrico made no objection in 1962 when the reapportionment act gave Henrico 1 delegate and then assigned 8 delegates jointly to Richmond and Henrico. While this distribution was in effect in 1963, we are told that a number of the 8 winning candidates, although resident in Richmond, received more votes in Henrico than did the candidates from that county. This would seem to refute somewhat Henrico's insistence that its citizens prefer to have their delegates come from Henrico.*" (Italics supplied.)

The formation of the multi-member district here under consideration is not an isolated instance of such procedure in the challenged statutes. On the contrary, in apportioning representation in the Senate of Virginia, the General Assembly combined the city of Portsmouth, the city of Chesapeake (formerly South Norfolk and Norfolk County) and the city of Virginia Beach (formerly Virginia Beach and Princess Anne County) into one multi-member district and allotted that district 3 Senators. Portsmouth has a population of 114,773 residents, Chesapeake has a population of 73,647 residents and Virginia Beach has a population of 85,218 residents. With an ideal representative ratio of 99,174 persons per Senator, the population of Portsmouth was sufficient to have justified the General Assembly in allocating it one Senator separately. However, the governing constitutional standard of "one person, one vote" could more nearly be approached by balancing off the population overage of Portsmouth with the population deficiencies of Chesapeake and Virginia Beach by combining the three political subdivisions into one multi-member district with a resulting population per Senator ratio of one Senator for each 91,213 persons in the combined district.

In this connection, it is significant to note that while the population of the city of Portsmouth would have *justified*

the General Assembly in awarding it one Senator separately, it does not follow that Portsmouth was therefore constitutionally *entitled* to be awarded one Senator separately. Similarly, the fact that the General Assembly would have been justified in alloting Henrico County three delegates separately does not mean that Henrico County is constitutionally entitled to such an allotment. So long as the constitutional principle of population-based representation is faithfully reflected in an apportionment statute, the formation of multi-member districts rather than single-member districts infringes no individual or personal constitutional right of the citizens of any district. As this Court stated in *Reynolds* v. *Sims, supra,* at 579:

> "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. *Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" (Italics supplied.)

In light of the above-quoted language, it is manifest that the instant appellants' contention that Henrico County has a constitutional right to exclusive representation in the House of Delegates of Virginia by representatives who are responsible only to the citizens of Henrico County for their election is utterly without constitutional foundation. Nothing contained in any of the cases decided by this Court on July 15, 1964, and collectively styled *The Legislative Apportionment Cases*—or any other decision of this Court—lends even remote support for such a contention. As a consequence, counsel for these appellants attempted in the court

below—and are now attempting—to read into *The Legislative Apportionment Cases* additional constitutional requirements which those cases do not prescribe. The assertion that the Henrico plaintiff-interveners have a constitutional right (regardless of equality of district population) to exclusive representation in the House of Delegates of Virginia expresses merely the *political preference of the specific interveners in this litigation,* not a *constitutional right* of such interveners or of the citizenry of Henrico County—the class interveners represent.

When one considers the nature of the class which the instant appellants represent, it is apparent that their suggestion that the purpose and effect of the challenged consolidation "was to minimize and dilute the effectiveness of the growing Negro vote in the city of Richmond and the increasing Republican strength in Henrico County" is—so far as these appellants are concerned—sheer afterthought. See, Jurisdictional Statement, p. 18. Such a contention was indeed made in the court below by the Richmond plaintiff-interveners, representing a group of Negro citizens of the city of Richmond, and was found by the district court to be without merit. However, the Henrico plaintiff-interveners, appellants here, do not and cannot represent—nor have they ever purported to represent—either Republicans or the Republican Party or any Republican organization or Negroes or any Negro organization. On the contrary, it is manifest from their complaint in intervention and the opinion of the district court that the only class represented by these appellants is the citizenry of Henrico County at large. Thus, even if it could be suggested that the purpose and effect of the challenged consolidation was to minimize or dilute the effectiveness of a growing Negro or Republican vote in the city of Richmond or Henrico County, it is clear that these

appellants are utterly without legal standing to raise such an issue. Equally applicable to them with respect to such a contention is the observation of this Court in *Bailey* v. *Patterson,* 369 U.S. 31, 33:

> "They cannot represent a class of whom they are not a part."

CONCLUSION

After extensive consideration of the constitutional deficiencies alleged by the instant appellants to be present in the challenged reapportionment statutes, the district court declared (Appendix A, App. 2, 4, 8):

> ". . . Our examination of the record discloses no such trespasses or fouls.
>
> * * *
>
> "At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the constitutional standard of weight and fineness, 'one person, one vote.'
>
> * * *
>
> "The record does not authorize attribution to the General Assembly of caprice or an unacceptable motive in the Henrico and Richmond reapportionment. To the contrary, a firm foundation may be seen for it."

Any impartial analysis of the statutes challenged in the case at bar discloses that they have been enacted in faithful compliance with the governing constitutional rule of population-base representation and that appellants, and all others similarly situated in the class they represent, are citizens and voters of a legislative district which has been formed in accordance with this constitutional mandate. Under such circumstances, the challenged enactments infringe no rights

guaranteed these appellants by the Equal Protection Clause of the Fourteenth Amendment. Counsel for appellees submit therefore that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellees in the above-captioned matter, hereby certify that copies of this Statement of Appellees Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 7th

day of July, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Edmund D. Campbell, Esq., Southern Building, Washington, D. C. and E. A. Pritchard, Esq., 106 North Payne Street, Fairfax, Virginia, Attorneys for plaintiff Harrison Mann, et al.; Aubrey L. Bowles, Jr., Esq., 901 Mutual Building, Richmond, Virginia, and L. Paul Byrne, Esq., 10 South 10th Street, Richmond, Virginia, Attorneys for Henrico plaintiff-interveners Simeon A. Burnette, et al.; S. W. Tucker, Esq. and Henry L. Marsh, III, 214 East Clay Street, Richmond, Virginia, Attorneys for Richmond plaintiff-interveners William S. Thornton, et al.; H. Ratcliffe Turner, Esq., Commonwealth's Attorney for Henrico County, 22nd and Main Streets, Richmond, Virginia, Attorney for defendants Helen D. Clevenger, et al.; T. Gray Haddon, Esq., Commonwealth's Attorney for the City of Richmond, City Hall, Richmond, Virginia, Attorney for defendants Thomas R. Miller, et al.; Henry E. Howell, Esq., 808 Maritime Tower, Norfolk, Virginia, Sidney H. Kelsey, Esq., 1408 Maritime Tower, Norfolk, Virginia, and Leonard B. Sachs, Esq., Citizens Bank Building, Norfolk, Virginia, Attorneys for plaintiff-interveners Charles L. Glanville, et al.; William J. Hassan, Esq., Commonwealth's Attorney for Arlington County, Court House, Arlington, Virginia, Attorney for defendants H. Bruce Green, et al.; Ralph G. Louk, Esq. and Quin S. Elson, Esq., Fairfax, Virginia, Attorneys for defendants Thomas P. Chapman, Jr., et al., and Alfred W. Whitehurst, Esq., Commonwealth's Attorney for the City of Norfolk, Norfolk, Virginia, Attorney for defendants William L. Prieur, Jr., et al.

Assistant Attorney General

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 2604

Harrison Mann, et al.

v.

Levin Nock Davis, et al.

(Argued March 10, 1965 Decided April 9, 1965)

Before BRYAN, Circuit Judge, and LEWIS and HOFFMAN, District Judges.

OPINION

ALBERT V. BRYAN, Circuit Judge:

Virginia's 1964 reapportionment of the State into districts for the election of delegates and senators in her General Assembly, following our invalidation of the 1962 redistricting,[1] is here attacked as denying Fourteenth Amendment equal protection of the laws. The assault is made in three separate intervening petitions in the original action, each dealing with a local problem, by certain citizens of Henrico

[1]Mann v. Davis, 213 F. Supp. 577 (1962), affirmed sub. nom. Davis v. Mann, 377 U.S. 678 (1964) By order entered September 18, 1964 this court restored its injunction which had been suspended during the appeal. Thereupon the Legislature adopted a new apportionment in December 1964. The statute relating to the State Senate appears as Chapter 1, and the enactment relating to the House of Delegates as Chapter 2, of the Acts of Assembly, Extra Session 1964.

County, the City of Richmond and Shenandoah County. We think only Shenandoah can prevail.

HENRICO COUNTY

The grievance asserted by these intervenors is that Henrico County and Richmond were placed in a single district, No. 36, for representation in the House of Delegates, rather than each made an independent district. Combined, these two political subdivisions were given 8 delegates, but Henrico pleads for 3 delegates of its own, leaving the remaining 5 to Richmond. The injury from the consolidation, according to the county, is that as Richmond has a voting power greater than Henrico, the city will be able to elect all 8 delegates and Henrico will have no representation by its own citizens.

This result, says Henrico, is due to a general disregard by the General Assembly of the guide lines and ground rules thus far enunciated for legislative apportionment by the Supreme Court. E.g. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Westberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964); Fortson v. Dorsey, 379 U.S. 433 (1965). Our examination of the record discloses no such trespasses or fouls. To demonstrate the correctness of this conclusion, we review the 1964 reapportionment (the Act), touching particularly upon the features on which Henrico found its accusations.

Ideal representation in the House of Delegates, when Virginia's total population according to the 1960 census is distributed among its 100 delegates, is 39,669 persons for

each member. Richmond had a population of 219,958, Henrico 117,339. Applying these figures, it appears that Henrico would be entitled to 2 delegates and wanting but 3,668 residents for a third. Richmond alone could justify 5 delegates, with 21,613 towards a sixth. To have awarded only 5 delegates to Richmond would have meant that each of its delegates represented 43,911, or 4,242 persons in excess of the norm. With Henrico not quite earning 3 delegates, but Richmond due more than 5, the solution of the Virginia Assembly was to give the two areas 8 delegates jointly. There would then be 42,164 persons per delegate, a representation fairly nearing the par of 39,669.

A multi-member district, though linking more than one political subdivision, is not Constitutionally impermissible. Fortson v. Dorsey, supra, 379 U.S. 433 (1965). A multi-county or a county-city district is also legal. Id. But the possibility that a delegate or delegates may be chosen from one part of a district—whether a multi-county or a county-city district—rather than from another exposes no defect in the allotment. Id. In passing, it is at least noteworthy that Henrico made no objection in 1962 when the reapportionment act gave Henrico 1 delegate and then assigned 8 delegates jointly to Richmond and Henrico. While this distribution was in effect in 1963, we are told that a number of the 8 winning candidates, although resident in Richmond, received more votes in Henrico than did the candidates from that county. This would seem to refute somewhat Henrico's insistence that its citizens prefer to have their delegates come from Henrico.

The multi-member policy here does not have the "undesirable features" mooted in Lucas v. Colorado General Assembly, supra, 377 U.S. 713, 731 with footnote 21 (1964). The unification does not constitute so spacious or "populous"

a territory as to demand the establishment of "identifiable constituencies." Indeed, Henrico now pledges its willingness to have 3 delegates elected at large from among its whole population of 117,339 and without a smaller constituency than its entire area.

The effect of the Act has not been to obliterate the traditional integrity in Virginia of city and county lines. The custom was sanctioned in Davis v. Mann, supra, 377 U.S. 678, 686 (1964). The individuality of Henrico and Richmond is observed by the design of a separate senatorial district for each. We see no inconsistency in allocating senators on a different basis from delegates. Such a variation has been authoritatively approved, when, as presently, it may tend to "balance off minor inequities." Reynolds v. Sims, supra, 377 U.S. 533, 577, 579 (1964).

Physical factors could reliably have directed the judgment of the General Assembly in determining upon the union of Richmond and Henrico. They form a compact and contiguous territory. If they may not agree politically, concededly their interests are interknit and common in many aspects. The county is the residence of hundreds of business, professional and otherwise occupied persons plying their callings in the city. In fact, while the two are distinct governmental units, the courthouse of the county is situate well within the city's corporate limits. At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the Constitutional standard of weight and fineness, "one person, one vote."

City of Richmond

Certain Richmond Negro residents question the fusion of the city and Henrico County for the election of delegates on the ground that it deprives Negro citizens of a chance

to elect one of their race to the General Assembly. They point out that the population of Richmond consists of 92,331 non-white and 127,627 white persons; that in Henrico the non-white residents number 6,070, the white 111,269; and that the potential vote of Negroes in Richmond is, by the coadunation, reduced from 42% (the percentage of non-white in Richmond) to 29% (the percentage of non-whites in the aggregate population of the city and Henrico).

Further, they suggest that the Negro communities in Richmond are so located that any division of the city into 5 fairly equal segments, each embracing a sufficient number of inhabitants for a delegate, would create 1 or more districts in which Negroes would be the majority. Additionally, they say that if the city were divided into 2 substantially equal districts with the allotment of 1 of Richmond's 2 senators to each district, the colored population in at least 1 might elect a senator.

Consequently, these intervenors suggest that Richmond be assigned 5 delegates apart from Henrico, and that the 5 be distributed, 1 to a district, among 5 substantially equal districts. Likewise, they ask that the city be fairly split into 2 senatorial districts. These contentions are underbraced by advertence to the Virginia constitutional injunction that legislators be elected by the voters of the several senatorial and house districts, and that apportionment of the "State" into such districts be made every ten years. §§ 41, 42 and 43. From this they conclude that these clauses command legislative allocation, both within and without city and county marches, by population and not according to existing governmental units. Omission of such delineations inside the city and State-wide, the intervenors aver, violates the Fourteenth and Fifteenth Amendments, as a deprivation of equal protection of the election laws and abridgement of the right to vote. We disagree.

To begin with, we reaffirm our earlier declaration of the validity of conjoining Richmond and Henrico. Moreover, as we have also shown, adherence to municipal boundaries in establishing legislative districts has been declared to be altogether free of legal infirmity. Furthermore, the racial exclusion decried in Gomillion v. Lightfoot, 364 U.S. 399 (1960) and universally forbidden is not evident. Neither Richmond, nor any other city or county in Virginia has in her history ever been sub-districted. Even councilmen for the local government of Richmond are elected at large, and this without question by either race.

The concept of "one person, one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.

As Justice Douglas, though in dissent but obviously undeniably, tartly put it in Wright v. Rockefeller, 376 U.S. 52, 62, 66 (1964):

> "The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."

Page 66:

> "... The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.... Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines...."

Previously Justice Douglas had said for the Court in Gray v. Sanders, supra, 372 U.S. 368, 380 (1963):

> "... The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, ... and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State."

SHENANDOAH COUNTY

Certain citizens of Shenandoah County protest they have been deprived of Constitutional rights by the 1964 assignment of delegates in the 50th and 59th districts. The former, which has been assigned 1 delegate, comprises Page, Rockingham, Shenandoah Counties and the City of Harrisonburg. The 59th district encompasses only Rockingham County and Harrisonburg but it is also given 1 delegate. Harrisonburg is geographically within Rockingham County. Over-representation of Shenandoah County under the 1962 reapportionment was noted in Davis v. Mann, supra, 377 U.S. 678, 688; it had "one seat in the Virginia House" although its population was 21,825 as compared to the "ideal ratio of one delegate for each 39,669 persons."

In 1964 Shenandoah's 21,825 people were leagued with Rockingham's 39,559, Page County's 15,572, and Harrisonburg's 12,842, increased to 13,804 by an annexation in 1962.* Obviously this readjustment erects a district of 90,760, far above criterion of 39,669. Rockingham and Harrisonburg are saved from injustice by their additional

*These figures are taken from the face of the complaint of the Shenandoah Intervenors. The U.S. Bureau of Census' U.S. Census of Population: 1960 General Population Characteristics, Virginia. Final Report PC(1)-48B, reveals Rockingham's population as 40,485 and Harrisonburg's as 11,916 rather than 12,842 prior to annexation.

delegate, but Shenandoah with Page suffers from a clear under-representation.

Invidious discrimination has thus been visited upon Shenandoah. With primary elections for the General Assembly scheduled for July of this year, and candidates' filing times therefor expiring in April, correction of this injury to Shenandoah County cannot await the convening of the General Assembly in 1966. Consequently, we are required to act to prevent the watering down of the Shenandoah votes. Until the General Assembly can rectify the inequity, we must set aside the 1964 apportionment of the 50th and 59th districts. In lieu of the present provision for them, the court will order that the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg be assigned 2 delegates to represent all four of these political subdivisions jointly. This adjustment will effectuate a representation of 45,380 persons per delegate. While this is above the proper ratio, we do not deem it an unfair approach in the circumstances.

Recapitulation

The record does not authorize attribution to the General Assembly of caprice or an unacceptable motive in the Henrico and Richmond reapportionment. To the contrary, a firm foundation may be seen for it. For Shenandoah County, however, the imbalance in representation is obvious and fatal.

An order will be entered dismissing the intervening complaints of Henrico and Richmond, but sustaining the claim of the Shenandoah intervenors, with the relief we have prescribed. The order will also express our approval of the Act insofar as such approval is required to remove any question or doubt of the validity of any legislation which has been, or may be, passed by the General Assembly since the adoption

of the Act, our order of September 18, 1964 having required the General Assembly acting thereafter to make a Constitutionally valid reapportionment of the State before undertaking any other legislation.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 2604

Harrison Mann, et al.

v.

Levin Nock Davis, et al.

ORDER ON PETITIONS AND COMPLAINTS OF INTERVENORS FROM HENRICO COUNTY, CITY OF RICHMOND AND SHENANDOAH COUNTY

Upon consideration of the intervening petition and complaint of Simeon A. Burnette, et al., designated as the Henrico County intervenors, the intervening petition and complaint of William S. Thornton, et al., designated as the City of Richmond intervenors, and the intervening petition and complaint of Jesse D. Funkhouser, et al., designated as the Shenandoah County intervenors, the answers thereto, the evidence adduced thereon, as well as the arguments of counsel, on brief and orally, the court for the reasons stated in its opinion this day filed, which is adopted as its findings of fact and conclusions of law, orders as follows:

1. That the petitions and complaints of the Henrico County and the City of Richmond intervenors be, and they

are hereby, dismissed, the respondents thereto recovering their costs of the said intervenors;

2. That the petition and complaint of the Shenandoah County intervenors be, and they are hereby, sustained in respect to the apportionment of representation of that county in the House of Delegates;

3. That the State and local election officials who are defendants to the said intervening petition and complaint of Shenandoah County be, and each of them is hereby, enjoined and restrained from acting under and pursuant to so much of Chapter 2 of the Acts of the General Assembly of Virginia, Extra Session 1964, as declares the representation in the House of Delegates for the 50th and 59th districts; that the court now reapportions the said districts so that the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg shall be represented jointly by two delegates; that the reapportionment of the 50th and 59th districts of Virginia as aforesaid shall be effective for the elections, both primary and general, of members of the House of Delegates from the counties of Page, Rockingham and Shenandoah and the City of Harrisonburg in the year 1965 and thereafter until the General Assembly of Virginia shall provide a Constitutionally valid apportionment of representation in the House of Delegates for Shenandoah County; and

4. That the court hereby approves the reapportionment Acts of the General Assembly of Virginia adopted at its Extra Session in December 1964, insofar as such approval may be required to remove any question or doubt of the validity of any legislation which has been, or may be, passed by the General Assembly since the adoption of the said reapportionment Acts.

Nothing further remaining to be done in this action, it is ordered stricken from the docket, and this order is final.

ALBERT V. BRYAN
United States Circuit Judge

WALTER E. HOFFMAN
United States District Judge

OREN R. LEWIS
United States District Judge

April 9th, 1965.

APPENDIX C

§ *24-12. Apportionment of members of House of Delegates.*—Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

First.—Chesapeake, two.
Second.—Accomack and Northampton, one.
Third.—Albemarle and Greene, one.
Fourth.—Charlottesville, one.
Fifth.—Alexandria, two.
Sixth.—Alleghany, Botetourt, Covington and Clifton Forge, one.
Seventh.—Amelia, Lunenburg and Nottoway, one.
Eighth.—Amherst and Lynchburg, one.
Ninth.—Arlington, four.
Tenth.—Augusta, Highland, Staunton and Waynesboro, two.
Eleventh.—Bedford, one.
Twelfth.—Bland, Craig, Giles, Pulaski and Wythe, two.

Thirteenth.—Danville and Pittsylvania, one.
Fourteenth.—Brunswick and Dinwiddie, one.
Fifteenth.—Buchanan, one.
Sixteenth.—Russell and Dickenson, one.
Seventeenth.—Roanoke City and Roanoke County, one.
Eighteenth.—Campbell, one.
Nineteenth.—Caroline, King George, Essex and King and Queen, one.
Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church, one.
Twenty-first.—James City, York and Williamsburg, one.
Twenty-second.—Charlotte, Cumberland and Prince Edward, one.
Twenty-third.—Chesterfield and Colonial Heights, two.
Twenty-fourth.—Clarke, Frederick and Winchester, one.
Twenty-fifth.—Danville, one.
Twenty-sixth.—Hampton, two.
Twenty-seventh.—Fairfax County, and cities of Fairfax and Falls Church, six.
Twenty-eighth.—Fauquier, Warren and Rappahannock, one.
Twenty-ninth.—Fluvanna, Goochland, Louisa and Powhatan, one.
Thirtieth.—Franklin County and Floyd, one.
Thirty-first.—Gloucester, Mathews, New Kent, Charles City and Middlesex, one.
Thirty-second.—Carroll, Grayson and Galax, one.
Thirty-third.—Greensville, Surry and Sussex, one.
Thirty-fourth.—Halifax and South Boston, one.
Thirty-fifth.—Hanover and King William, one.
Thirty-sixth.—Henrico, and city of Richmond, eight.

Thirty-seventh.—Henry, Patrick and Martinsville, two.
Thirty-eighth.—Isle of Wight, Southampton, and city of Franklin, one.
Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond County, one.
Fortieth.—Newport News, three.
Forty-first.—Lee, Wise, and city of Norton, two.
Forty-second.—Loudoun and Prince William, two.
Forty-third.—Lynchburg, one.
Forty-fourth.—Madison, Culpeper and Orange, one.
Forty-fifth.—Mecklenburg, one.
Forty-sixth.—Montgomery and Radford, one.
Forty-seventh.—Nansemond and Suffolk, one.
Forty-eighth.—Nelson, Appomattox and Buckingham, one.
Forty-ninth.—Norfolk City, seven.
Fiftieth.—Page, Rockingham, Shenandoah and Harrisonburg, one.
Fifty-first.—Petersburg, one.
Fifty-second.—Pittsylvania, one.
Fifty-third.—Portsmouth, three.
Fifty-fourth.—Prince George and Hopewell, one.
Fifty-fifth.—Virginia Beach, two.
Fifty-sixth.—Roanoke County, one.
Fifty-seventh.—Roanoke City, two.
Fifty-eighth.—Rockbridge, Bath and Buena Vista, one.
Fifty-ninth.—Rockingham and Harrisonburg, one.
Sixtieth.—Smyth, one.
Sixty-first.—Spotsylvania, Stafford and Fredericksburg, one.
Sixty-second.—Tazewell, one.
Sixty-third.—Washington, Scott and Bristol, two.

And the districts hereby created are hereby numbered one (1) to sixty-three (63) inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five. (Code 1919, § 78; 1932, p. 338; 1942, p. 620; 1948, p. 803; 1952, Ex. Sess., c. 18; 1958, c. 333; 1962, c. 638; 1964, Ex. Sess., c. 2.)

§ *24-14. State senatorial districts.*—The State is hereby divided into thirty-three districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, Mathews, Gloucester and York, one.

Second.—Norfolk City, three.

Third.—The cities of Chesapeake, Portsmouth and Virginia Beach, three.

Fourth.—The counties of Halifax, Charlotte, Prince Edward, Lunenburg and Nottoway and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton, and the cities of Suffolk and Franklin, one.

Sixth.—The counties of Greensville, James City, Prince George, Surry and Sussex, and the cities of Hopewell and Williamsburg, one.

Seventh.—The counties of Brunswick, Dinwiddie and Mecklenburg, and the city of Petersburg, one.

Eighth.—The counties of Arlington and Fairfax, and the cities of Fairfax and Falls Church, one.

Ninth.—Arlington County, one.

Tenth.—The counties of Appomattox, Buckingham, Amherst, Nelson and Campbell, one.

Eleventh.—Bedford County and city of Lynchburg, one.

Twelfth.—The counties of Henry, Patrick and Pittsylvania, and the cities of Danville and Martinsville, two.

Thirteenth.—The counties of Carroll, Floyd, Franklin and Montgomery, and the cities of Galax and Radford, one.

Fourteenth.—The counties of Washington, Lee and Scott and the city of Bristol, one.

Fifteenth.—The counties of Dickenson, Russell and Wise and the city of Norton, one.

Sixteenth.—The counties of Buchanan, Smyth and Tazewell, one.

Seventeenth.—The counties of Bland, Giles, Pulaski, Craig, Grayson and Wythe, one.

Eighteenth.—The counties of Alleghany, Bath, Botetourt, and Roanoke, and the cities of Clifton Forge and Covington, one.

Nineteenth.—The counties of Augusta, Rockbridge and Highland, and the cities of Buena Vista, Staunton and Waynesboro, one.

Twentieth.—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

Twenty-first.—The counties of Clarke, Frederick, Shenandoah and Loudoun and the city of Winchester, one.

Twenty-second.—The counties of Albemarle, Fluvanna, Greene, Cumberland, Powhatan and Madison, and the city of Charlottesville, one.

Twenty-third.—The counties of Goochland, Louisa, Orange, Spotsylvania, Culpeper, Caroline, King George and the city of Fredericksburg, one.

Twenty-fourth.—The county of Fairfax and the cities of Fairfax and Falls Church, two.

Twenty-fifth.—The counties of Prince William, Stafford and Fauquier, one.

Twenty-sixth.—The counties of Hanover, King William, Essex, King and Queen, Middlesex, Westmoreland, Northumberland, Richmond and Lancaster, one.

Twenty-seventh.—City of Newport News, one.

Twenty-eighth.—City of Hampton, one.

Twenty-ninth.—The counties of Charles City, Chesterfield, Amelia and New Kent and the city of Colonial Heights, one.

Thirtieth.—Richmond City, two.

Thirty-first.—County of Henrico, one.

Thirty-second.—City of Roanoke, one.

Thirty-third.—City of Alexandria, one. (Code 1919, § 79; 1922, p. 463; 1923, p. 17; 1934, p. 252; 1942, p. 622; 1948, p. 805; 1952, Ex. Sess., c. 17; 1958, c. 333; 1962, c. 635; 1964, Ex. Sess., c. 1.)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 241

SIMEON A. BURNETTE, et al.,
Appellants,

v.

LEVIN NOCK DAVIS, et al.,
Appellees.

Appeal From The United States District Court For The Eastern District of Virginia

---

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

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IN THE

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APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

THE QUESTIONS ON WHICH DECISION DEPENDS ARE SUBSTANTIAL AND SHOULD BE HEARD ON THE MERITS

The sole issue raised by appellees' motion for affirmance under Rule 16 is whether the questions on which the decision of this cause depends are so unsubstantial as not to need further argument (Appellees' Brief, pp. 2, 14).

The questions are substantial and they should be determined after hearing on the merits. They involve the basic problem foreseen in *Fortson* v. *Dorsey* (1965), 379 U.S. 433, 439, 13 L.ed2d 401, 405, 85 S.Ct. 498, 501, and in *Reynolds* v. *Sims* (1964), 377 U.S. 533, 578-579, 580-581, 12 L.ed2d 506, 537-538, 84 S.Ct. 1362, 1390-1391, i.e., whether a state may, when it reapportions its legislature, engage in partisan gerrymandering by combining into a single multi-member district two or more separate and independent political subdivisions, each of which is entitled by long established tradition to more than one independent representative according to the existing population ratio per representative, for the purpose or with the result of minimizing or canceling out the voting strength of racial or political elements of the voting population.

We respectfully submit that the summary affirmance of the judgment below will open the door on a nationwide scale for the employment of similar schemes to submerge all racial or political groups objectionable to those occupying the legislative seats of power. If it is constitutionally permissible for Virginia to change its long-established tradition of respect for the integrity of political subdivisions by combining Richmond City and Henrico County into a single multi-member district for the purpose or with the result of diluting or canceling out the voting strength of racial or political elements in either independent political subdivision, all the other states of the Union can effect similar combinations or arrangements to remove any racial or political group from all real participation in the legislative processes of representative, democratic government.

Since a state may legitimately construct districts along political subdivision lines to deter the possibilities of gerrymandering, as stated in *Reynolds* v. *Sims, supra,* it would seem to follow that a state may not constitutionally depart from a long-established tradition recognizing the integrity of such political subdivision lines when such departure is part of a gerrymandering scheme designed to minimize or cancel out the voting strength of racial or political elements of the voting population.

The decisions of this Court on legislative apportionment make it abundantly clear that not only is mathematical exactness or precision not a workable or attainable constitutional requirement but also that mathematics is not the sole and only criterion for determining whether a particular apportionment statute satisfies the Equal Protection Clause of the Fourteenth Amendment.

While the obvious importance of the questions involved is alone sufficient, we submit, to call for denial of the motion to affirm, we are impelled to direct attention to certain fallacies of appellees' argument and inaccuracies in their reference to facts so that the Court will not gain an erroneous impression of the record relating to the questions presented.

1. It is not a fact, and the record before this Court does not support the inference sought to be made at page 7 of appellees' brief, that the annexation proceedings brought by the City of Richmond against Henrico County on December 27, 1961, had their inception, directly or indirectly, in any act or resolution of the Board of Supervisors of Henrico County. The traditional resistance of the voters of Henrico

County to any political marriage with Richmond City was plainly illustrated by their rejection on referendum of the suggestion for merger notwithstanding its overwhelming support by the voters of Richmond City (Henrico Exhibit 20, R. 507).

2. Appellees contend that the consolidation of the city and county into a single multi-member district balanced the county's population deficiency for three delegates and the city's overage for five delegates and more nearly approached the mathematical ideal of "one person, one vote". (Appellees' Brief, p. 6). They also say that this was particularly true in view of the uncertainties as to population created by the then pending annexation proceeding, the award in which the city has since refused (Appellees' Brief, pp. 7-9; R. 657).

Appellees choose to ignore the fact that the allocation of 5 delegates to Richmond City, 2 delegates to Henrico County, and 1 floater delegate to both jointly would have solved all of those problems. The member of the House Privileges and Elections Committee resident in Richmond City who originally proposed the consolidation amendments (R. 80-82) conceded that such an allocation would have solved all the supposed problems claimed to have arisen out of the pending annexation proceeding (R. 105-106). An amendment to accomplish that exact apportionment was offered in the Senate at the 1964 Extra Session by the Senator from Henrico County and was defeated (Henrico Exhibit 14, R. 479, 480).

From time immemorial Virginia has traditionally employed the "floterial district" to take care of exactly such deficiences and overages. It was also available to take care

of the uncertainties claimed to have been created by the annexation proceedings. We have already shown the historical use in Virginia of the "floterial district" for that express purpose at pages 15-17 of Appellants' Jurisdictional Statement. This Court recognized that established Virginia tradition in footnote 2 of its opinion in *Davis* v. *Mann* (1964), 377 U.S. 678, 686-687, 12 L.ed2d 609, 615, 84 S.Ct. 1441, 1458.

The annexation proceeding pending in 1964 had nothing to do with the consolidation. It was merely an excuse.

3. The fact that Chap. 1, Acts, Extra Session 1964 (Appendix C, p. 1, with Appellants' Jurisdictional Statement) combined Chesapeake, Portsmouth and Virginia Beach into a single multi-member senatorial district, as pointed out at page 10 of Appellees' Brief, does not establish the constitutionality of that apportionment. Nor does the fact that no one has yet complained of it prove its validity. Even the affirmative approval of the affected electorate does not validate an otherwise impermissive legislative districting. *Lucas* v. *Colorado General Assembly* (1964), 377 U.S. 713, 12 L.ed2d 632, 84 S.Ct. 1472.

4. Appellees argue at pages 11-12 of their brief that the voters of Henrico County have no constitutional right to exclusive representation in the Virginia House of Delegates. That is not the question. The question is whether they can be deprived of their traditional representation as

a political subdivision by a gerrymandered change for the purpose of minimizing or canceling out the voting strength of racial or political elements of the voting population.

5. Appellees also contend "that these appellants are utterly without legal standing to raise" the questions presented (Appellees' Brief, pp. 12-13). These appellants are citizens of Virginia as well as residents of Henrico County and are affected by all aspects of the invalid scheme. It was as individual members of the class of all Virginia citizens as well as residents and supervisors of Henrico County that appellants intervened in this action. Appellees appear to concede that the class of all Virginia citizens includes *certain* residents of Richmond City and that *they*, at least, do have the right to present these questions. The scheme to dilute the voting strength of those Virginia citizens has produced a change in the appellants' traditional representation recognizing the integrity of their political subdivision. They are affected by the scheme and as Virginia citizens have the right to question its constitutional validity.

This Court had no difficulty in declaring the Virginia legislative apportionment acts of 1962 unconstitutional in their entirety upon the application of residents of Arlington and Fairfax Counties and of Norfolk City alone. We are confident that the Court will not affirm the judgment below on the ground that the appellants, though affected by the judgment, have no legal standing to appeal from it. *Bailey* v. *Patterson*, 369 U.S. 31, 7 L.ed2d 512, 82 S.Ct. 549, has no relevance here.

CONCLUSION

We again remind the Court that the Virginia reapportionment acts of 1964 still do not meet the *ideal* requirement—"one person, one vote". A majority of the Virginia Senate may still be elected by 48.2 per cent of the total population (Henrico Exhibit 3A, R. 386) and a majority of the Virginia House of Delegates can still be elected by 47.7 per cent of the total population (Henrico Exhibit 3B, R. 387).

It is respectfully submitted that the questions on which the decision of this cause depends are substantial and that they should be heard and decided on the merits.

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